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“CHINA’S FOOD INDUSTRY IN CRISIS: A DETAILED ANALYSIS OF THE FSL AND CHINA’S ENFORCEMENT OBSTACLES”

INA ILIN-SCHNEIDER

Introduction

"Food is essential, and safety should be a top priority. Food safety is closely related to people's lives and health, economic development and social harmony. We must create a food safety system of self-disciplined food companies with integrity, effective government supervision and broad public support to improve overall food safety."

Premier Li Keqiang, Head of the National Food Safety Commission, State Council, People Republic of China.¹

Melamine contaminated milk, toxic bean sprouts, aluminum dumplings, glow-in-the-dark pork, gutter oil, cadmium rice, toxic preserved fruits, fluorescent bleached mushrooms, fake eggs and the list goes on and on – this has been the sad reality of the Chinese food industry for the past several years.² Millions of Chinese citizens are paralyzed with fear of another food safety scare and doubt about the quality and safety of their next meal. More and more parents and caretakers around China are justifiably concerned about feeding their infants baby formula produced in China. Public trust in the Chinese food industry, especially in recent years, has been continuously dwindling, prompting officials to step up their efforts of improving overall food safety.

¹ *Vice premier orders efforts to improve food safety*, CHINADAILY, http://www.chinadaily.com.cn/china/2010-04/20/content_9749703.htm (last updated Apr. 20, 2010).

² Yanzhong Huang, *China's Corrupt Food Chain*, N.Y. TIMES, Aug. 17, 2012, http://www.nytimes.com/2012/08/18/opinion/chinas-corrupt-food-chain.html?pagewanted=all&_r=0.

Following the devastating incident in 2008 involving melamine contaminated baby formula, which killed six infants and sickened more than three hundred thousand others,³ the National People's Congress ("NPC") felt the public pressure to develop a comprehensive plan, which culminated in the passing of the 2009 Food Safety Law ("FSL").⁴ The new piece of legislation aimed to prevent and resolve future incidences of food safety violations. It was an attempt to restore the reputation and the public trust in the Chinese food industry.

This article argues that the enactment of the FSL has several significant implications for the Chinese food industry. First, the FSL creates a national monitoring system for food safety risks to monitor incidents of food contamination and imposes a mandate on the central and local government agencies to formulate and administer the FSL's rules and regulations.⁵ Second, the law tightens and streamlines national food safety standards, by placing the Ministry of Health ("MOH") in charge of developing and publicizing new national food safety standards that are scientific, reasonable, safe and reliable.⁶ Finally, the FSL imposes more rigorous penalties on food producers and traders who engage in illegal food safety practices and defines the illegal acts of government officials that would trigger a punishment under the FSL.⁷

However, the FSL has seen only limited success. The food poisoning cases in China are still quite common and public mistrust in China's food industry is high. This article takes the position that, even though the FSL is an important piece of legislation, the law, as it was drafted, has several limitations. First, the national food safety standards are obsolete, lacking,

³ See Céline Gossner, Jørgen Schlundt, Peter Embarek, et al., *The Melamine Incident: Implications for International Food and Feed Safety*, Environmental Health Perspectives, Vol. 117, No. 12, Dec., 2009, at 1803-1808, available at <http://www.jstor.org/stable/30249857>.

⁴ See Zhonghua Renmin Gonghe Gou Shipin Anquan Fa (Shi Xing), *Food Safety Law of the People's Republic of China*, promulgated by the Standing Comm. Nat'l People's Cong., Feb. 28, 2009, effective June 1, 2009, (P.R.C) [hereinafter Food Safety Law], available at <http://www.fas.usda.gov/gainfiles/200903/146327461.pdf>.

⁵ Id. art. 11.

⁶ Id. art. 1, 7-10.

⁷ Id. art. 84, 91-93.

inconsistent, overlap or are duplicates of already existing standards.⁸ Second, the FSL failed to cut or consolidate the number of agencies, despite the FSL's efforts to nationalize China's monitoring and enforcement system through the Food Safety Committee ("FSC"). Third, the law is only partially successful at preventing future incidences of food safety violations. Even though the FSL does a relatively good job in identifying punishable illegal activities, there are no provisions referring to the issue of deterrence.

In addition to FSL's limitations, the Chinese government faces several substantial enforcement obstacles. This article argues that while the FSL proposes solutions to China's food safety problems, it will have to overcome serious implementation obstacles, such as: local economic protectionism; corruption, unscrupulous practices and lack of integrity; and environment influences on food safety.

Part I of this article examines the FSL's vital provisions and recognizes the FSL's partial success. Part II addresses FSL's limitations and offers suggestions for how the law can be expanded to address the root causes of food safety problems. Part III exposes the obstacles the Chinese government faces in enforcing the FSL. In Part IV, the article concludes, that before China can regain the public trust in the safety of the Chinese foods, the government needs to step up its efforts not only legislatively, but must also develop effective enforcement mechanisms.

I. The Food Safety Law Of 2009

The public outcry over the death of six infants and the devastating long-term injuries of as many as three hundred thousand others, who consumed the melamine tainted infant formula, has prompted the passage of China's Food Safety Law.⁹ On February 28, 2009, after a five year drafting period, China's NPC Standing Committee passed the first comprehensive Food Safety

⁸ Yang Lina, *China punishes food safety criminals in 2011*, XINHUA, Feb. 09, 2012, http://news.xinhuanet.com/english/china/2012-02/09/c_131401041.htm.

⁹ Gossner at al., *supra* note 3.

Law (“FSL”), which entered into effect on June 1, 2009.¹⁰ This section highlights significant FSL provisions that have had the highest impact on the Chinese food industry since FSL’s enactment.

A. Centralized Surveillance and Assessment of Food Safety Risks

Recognizing China’s inefficient food monitoring system as one of the main causes of previous food safety violations, the NPC, as “the highest organ of state power,”¹¹ decided to create a new governmental department solely dedicated to food safety oversight and enforcement of applicable standards and regulations.¹² The new department, accordingly named the Food Safety Committee, was an essential ingredient in trying to prevent and resolve future incidences of food safety violations.¹³ To assure the creation of the FSC, the NPC included Article 4 in the FSL, which requires the State Council¹⁴ to establish the FSC and put it in charge of supervising and coordinating the work of five regulatory departments under the State Council, including

¹⁰ See Food Safety Law, *supra* note 4.

¹¹ See Susan Lawrence, Michael Martin, *Understanding China’s Political System*, Congressional Research Service, March 20, 2013, at 7, available at <http://www.fas.org/sgp/crs/row/R41007.pdf>. (The constitution also gives the NPC numerous powers, such as the power to amend the constitution, supervise its enforcement, enact and amend laws, ratify and abrogate treaties, approve state budget and plans for national economic and social development, elect and impeach top officials of the state and judiciary and supervise the work of the State Central Military Commission, the Supreme People’s Court, and the Supreme People’s Procuratorate. In practice, however, the NPC has those powers only on paper due to the dual identity of many of its deputies and the way they are elected.)

¹² Food Safety Law, *supra* note 4, art. 4. See also Shan Juan, *New department devoted to food safety*, CHINADAILY, http://www.chinadaily.com.cn/food/2013-03/05/content_16278075.htm. (last updated March 05, 2013).

¹³ Id.

¹⁴ Id. See also Lawrence, *supra* note 11, at 31. (State Council is the highest administrative body in the state. It includes State Council’s Legislative Affairs Office (“SCLAO”), which is regularly involved in the formulation of national laws and regulations. SCLAO “drafts the government’s legislative agenda on a year-to-year basis and then works with relevant government ministries and agencies to implement the agenda, including overseeing the drafting of regulations and laws.”)

departments of health, agriculture, quality supervision, industry and commerce administration, and food and drug supervision.¹⁵

According to Liu Xirong, the vice chairman of the NPC Law Committee, the FSC's primary task was to function as a "high level coordinating organization" and to identify and solve food safety problems within China's food safety system before they lead to tragedies.¹⁶ In 2010, the State Council has formed the FSC, consisting of three vice premiers – Li Keqiang, Hui Liangyu and Wang Qishan – and a dozen minister-level officials.¹⁷ As mandated under the FSL,¹⁸ the State Council exercised its authority directing FSC's high-profile panel of government officials to analyze China's food safety situation, guide and coordinate food safety work, make food safety policies, and urge the relevant departments to fulfill their responsibilities in food supervision."¹⁹

To improve the coordination among regulatory departments under the State Council, the FSL has conferred the primary authority to formulate and enforce the national monitoring plan on food safety risks to the MOH.²⁰ In addition, the FSL directed the local government executive departments of health to formulate and enforce those plans within their respective jurisdiction in accordance with the national monitoring plans on food safety risks.²¹ Essentially, the MOH has

¹⁵ Food Safety Law, *supra* note 4, art. 4.

¹⁶ *China to set up central food safety commission*, Embassy of the People's Republic of China in the U.S., Feb. 25, 2009, available at <http://www.china-embassy.org/eng/gyzg/t539233.htm>.

¹⁷ *China's determination to ensure food safety*, China.org., Feb. 11, 2010, http://www.china.org.cn/china/2010-02/11/content_19411151.htm.

¹⁸ Food Safety Law, *supra* note 4, art. 4. (The FSL does not provide any guidance regarding the membership or the duties of the FSC. It is up to the State Council to decide how the FSC should be staffed and what responsibilities and duties it should have.)

¹⁹ Cai Hong, *Food safety system needs more bite*, CHINADAILY, http://www.chinadaily.com.cn/cndy/2012-04/14/content_15046822.htm (last updated April 14, 2012).

²⁰ Food Safety Law, *supra* note 4, art. 11. (Even though, MOH has the leading role in governing food safety, it must work with the relevant State Council departments.)

²¹ Id. art. 5, 11, 70. (The FSL directs the local governments to define the regulatory responsibilities in accordance with the national standards and the State Council regulations and to establish and enforce a food safety accountability system, which must oversee the regulatory food safety agencies. To put it differently, the FSL places the local governments on the forefront of food inspections requiring a system of food safety regulations at every step

the primary responsibility for the overall food safety coordination; it must evaluate food safety risks, formulate food safety standards, issue public notifications on food safety, develop accreditation norms for food testing agencies and investigate major food safety incidents.²² If the MOH discovers any problems relating to food safety, it is required under the FSL to organize inspections and food safety risk assessments immediately.²³ To offer technological and scientific support for the regulators in evaluating, monitoring, and communicating food security risks and food safety standards, as well as issuing early warnings, the MOH has launched the National Center for Food Safety Risk Assessment (“Center”) in 2011.²⁴ Since then, the Center has established more than three hundred monitoring locations across the country, including sites in supermarkets and farm produce markets.²⁵

The national monitoring plan on food safety risks has shown some noteworthy success in detecting food safety violations.²⁶ In 2011, the FSC has reported that in response to concerns about the use of harmful food additives, the official investigators have inspected close to six

in the food chain. If a food safety incident occurs, local governments have the obligation to formulate and submit emergency plans within their jurisdictions to the higher level government based on relevant laws, regulations and emergency plan of the higher level government.)

²² Id. art 4, 13-14. (In respect to other regulatory agencies, the FSL requires the General Administration of Quality Supervision, Inspection and Quarantine (“GAQSIQ”), the State Administration for Industry and Commerce (“SAIC”) and the State Food and Drug Administration (“SFDA”) to regulate food manufacturing, food distribution and catering service, respectively, in accordance with the set national standards. The FSL requires the MOH in conjunction with GAQSIQ, SAIC and SFDA to formulate and enforce national assessment mechanisms for food safety risks. The MOH is responsible for organizing scientifically conducted food safety risk assessments.)

²³ Id. art. 14-16, 72. (GAQSIQ, SAIC and SFDA must make recommendations on food safety risk assessment and offer relevant information and documents. If the inspections and assessments confirm that a food is dangerous, the regulatory agencies (GAQSIQ, SAIC and SFDA) must take immediate actions to stop consumption of the unsafe food. In extraordinary cases the executive department of health is authorized to immediately formulate or modify the applicable food safety standards.)

²⁴ *China forms food safety risk assessment center*, Chinese Government’s Official Web Portal, Oct. 14, 2011, http://english.gov.cn/2011-10/14/content_1969694.htm.

²⁵ Id. See also, Zhen Jinran, *High hopes for new food safety monitoring*, CHINADAILY, March 15, 2013, http://www.chinadaily.com.cn/business/2013-03/15/content_16310118.htm (A researcher at the China National Center for Food Risk Assessment under the Ministry of Health has stated earlier this year that “[a]ll of China’s provinces and at least half of its cities and counties will have monitoring sites by 2013.”).

²⁶ Austin Ramzy, *China Food Safety: Big Crackdown, but Big Concerns Remain*, TIME, Aug. 5, 2011, <http://world.time.com/2011/08/05/china-food-safety-big-crackdown-but-big-concerns-remain/>.

million food and additive producers.²⁷ As a result of these investigations, Chinese authorities have arrested 2,000 individuals and ordered closings of 4,900 businesses suspected to have been involved in food safety violations.²⁸ The successful enforcement was a product of an effective collaboration of several regulatory executive departments under the State Council, including agricultural, industrial, commercial, quality control and food authorities.²⁹ Nevertheless, as noted by China's Premier Wen Jiabo, "China's food industry is still suffering from unstandardized management and many hidden safety risks."³⁰

Accordingly, reflecting continuous efforts to improve food safety, the State Council has laid out measures in June 2012, calling for strengthening regulatory oversight and imposing harsher punishments on violators.³¹ In particular, the State Council has emphasized the need for the government to enhance supervision by establishing "an efficient mechanism that [would] cover all links in the food industry."³² One such mechanism that closes the regulatory oversight gap is the state licensing requirement for food producers and traders.³³ Under the FSL's mandatory state licensing system, any organization or individual involved in the food business is required to obtain a proper license.³⁴ Reflecting the seriousness of combating oversight loopholes, the Standing Committee of the 13th Beijing Municipal People's Congress passed a bill

²⁷ Id.

²⁸ Id.

²⁹ Id.

³⁰ Anne Tang, *China introduces measures to enhance food safety*, Chinese Government's Official Web Portal, June 13, 2012, http://english.gov.cn/2012-06/13/content_2160318.htm.

³¹ Id.

³² Id.

³³ Food Safety Law, *supra* note 4, art. 29.

³⁴ Id. art 29, 31. 43-48. (The relevant executive regulatory departments at the county level and above have the authority to grant or deny a licensing application upon reviewing the application and inspecting the applicant's production or trading facilities, if necessary. In addition, the FSL requires a state license for the production of novel foods, new food additive varieties or new food related products. The safety of the new foods and food additives must be reviewed by the MOH.)

earlier this year that went into effect on April 1, 2013.³⁵ The bill revokes state licenses issued to food producers and vendors who produce or sell unsafe foods, and effectively bans these food producers and vendors from the sector for life.³⁶

In addition to defining responsibilities of central and local governments with respect to food safety regulations, the FSL has also embraces the involvement of non-governmental third parties.³⁷ In particular, the FSL requires food producers and traders to strictly follow the applicable laws and food safety standards and mandates food industry associations to tighten their self-discipline.³⁸ In line with the FSL mandates, the State Council urged Chinese food industries in 2012 to “accept primary responsibility in ensuring food quality and safety.”³⁹ This responsibility includes regular inspections to ensure that preventive measures are implemented and to eliminate potential food safety risks as soon as possible.⁴⁰ The FSL also encourages media’s and consumers’ involvement in food safety enforcement.⁴¹ China’s latest efforts to “encourage the public to report illegal activities [] to control and eliminate potential safety risks concerning food and medicine” have been to provide citizens with monetary rewards for legitimate reports on food safety violations.⁴²

³⁵ *Beijing to roll out tough food safety law*, Xinhua, http://news.xinhuanet.com/english/china/2012-12/27/c_132067702.htm (last updated Dec. 27, 2012) (Individuals, companies, or executives of companies responsible for food safety problems will be banned from operating in the food industry for five years after their firm’s license revocation.)

³⁶ *Id.*

³⁷ Food Safety Law, *supra* note 4, art. 1, 7-10.

³⁸ *Id.*

³⁹ Tang, *supra* note 28.

⁴⁰ Food Safety Law, *supra* note 4, art. 60, 70, 71. (The FSL eliminated the food safety inspection exemption, subjecting food industries to the same national standards across the board.)

⁴¹ *Id.* art. 1, 7-10.

⁴² *China to reward food and drug whistleblowers*, CHINADAILY, Jan. 15, 2013, http://www.chinadaily.com.cn/china/2013-01/15/content_16122373.htm (According to SFDA circular, China will give up to 300,000 yuan (\$48,000) cash reward to individuals for their reports on food safety violations.) However, it is questionable if people will in fact come forward, particularly because China is known for punishing activists for disturbing “social harmony”. See also Andrew Jacobs, *China Sentences Activist in Milk Scandal to Prison*, N.Y. TIMES, Nov. 10, 2010, http://www.nytimes.com/2010/11/11/world/asia/11beijing.html?_r=0 (In 2010 China has sentenced Zhao Lianhai, whose son was injured by the tainted formula in 2008, for speaking to foreign reporters, organizing a website for aggrieved parents and inciting social disorder.)

The struggle with achieving effective supervision over Chinese food industry has spurred a wave of technological innovations. For example, electronic food-safety tracking system can be used to check the manufacturer's identity.⁴³ According to Sun Pishu, the CEO of the Chinese information-technology company Inspur Group Co Ltd, "control[ing] food quality without the use of technology" and monitoring foods' origins absent a food-tracking system is nearly impossible or at best enormously challenging."⁴⁴ Not surprisingly, the hope is that technological advancements will aid Chinese regulators to better monitor the food industry and help consumers to hold food manufacturers accountable for the quality of their products through increased transparency.

B. Unified Food Safety Standards, Stricter Controls over Food Additives

Frequent media announcements about toxic Chinese food products highlight the need for uniform national food safety standards in the Chinese food industry. Thus, to protect public health, the NPC included important provisions in the FSL requiring the MOH to develop and publicize mandatory national food safety standards.⁴⁵ The standards are required to have a scientific basis and be reasonable, safe and reliable.⁴⁶ In addition, the standards must be subject to review and approval by the Food Safety National Standards Evaluation Committee ("Evaluation Committee"), consisting of an elaborate expert panel and the representatives from relevant executive regulatory departments under the State Council.⁴⁷ In December 2009, the

⁴³ Pliny Han, *Govt set to establish food safety program*, Chinese Government's Official Web Portal, March 15, 2012, http://english.gov.cn/2012-03/15/content_2092545.htm

⁴⁴ Id.

⁴⁵ Food Safety Law, *supra* note 4, art. 20, 21, 24, 25 (The pesticide residue limits and their testing methods must be developed by the MOH and the Ministry of Agriculture ("MOA") under the State Council. The complete list of food safety standards can be found under Article 20. In addition, the FSL requires the local executive departments and food industries to develop and strengthen local and industry standards, respectively, to ensure food quality and safety.)

⁴⁶ Id. art. 18.

⁴⁷ Id. art. 23. (The amount of discretion held by the MOH is unclear. The FSL states simply that the expert panel must include experts in the field of medicine, agriculture, food, nutrition.)

Chinese government has gathered a panel of forty two experts in the fields of hygiene, agriculture, food and nutrition to conduct risk assessment on food safety.⁴⁸

Last year, the MOH and seven other departments have jointly released the “12th Five-Year Plan for National Food Safety Standards” (“Plan”), which recognized the MOH’s significant achievements on the subject of food safety and China’s overall efforts to upgrade regulations and strengthen food safety standards.⁴⁹ The deputy director of Health Supervision Bureau of the MOH, Su Zhi, has stated that the administration is not only “making efforts to expand the number of qualified personnel from 93,000 to more than 100,000 by the end of 2015,” but also “make[s] special efforts to set standards for testing various contaminants, food additives and animal drug residue in food production by then.”⁵⁰ Additionally, the MOH has made significant progress in streamlining and integrating existing food standards⁵¹ on foods like vegetable oil, meat products, milk and dairy products, and promulgating 269 new national food safety standards for milk, food additive use and pesticide residue limits among other items.⁵²

Despite increased efforts to strengthen food safety standards, the MOH received plenty of criticism especially in relation to the new standards for milk that became effective on June 1, 2010.⁵³ Surprisingly, the new dairy standards were increased in the maximum limit for bacteria

⁴⁸ China Sets Up Expert Panel to Assess Food Safety, CHINADAILY, Dec. 9, 2009, http://www.chinadaily.com.cn/bizchina/2009-12/09/content_9147922.htm.

⁴⁹ 12th Five Year Plan for National Food Safety Standard (herein “12th Five-Year Plan”), GAIN Report, June 28, 2012, *available at* <http://gain.fas.usda.gov>. (The 12th Five-Year Plan is a document that sets economic and social policy objectives and incorporates international standards and experiences in administering the standards. The Plan is “formulated in accordance with the Food Safety Law, its implementing regulations and plans related to national food safety supervision for the purposes of carrying out national food safety standard work and improving the standard system.” The Plan is divided into several sections, which focus on China’s achievements and weaknesses, as well as on the guiding ideology, basic principles, objectives and tasks, as they relate to food safety. The Plan is mostly aspirational in character, but provides several practical considerations for how to achieve food safety.)

⁵⁰ *China forms food safety risk assessment center*, *supra* note 24.

⁵¹ 12th Five Year Plan, *supra* note 51. (Prior to the FSL, China had over 2,000 national standards, over 2,900 industrial standards and over 1,200 local standards on food, food additive and food-related products.)

⁵² *Id.*

⁵³ *Ministry defends controversial milk standard*, China.org., Dec. 1, 2011, http://www.china.org.cn/china/2011-12/01/content_24050529.htm.

in raw milk, or the aerobic plate count, and lowered in the protein content requirement, reflecting one of the weakest standards for milk in the world.⁵⁴ This decision seems somewhat counterintuitive. Instead of encouraging dairy producers to improve their milk production practices, the MOH decided to reduce milk quality requirements in order to accommodate dairy farmers' lower benchmarks. However, responding to the criticisms, the MOH official, Zhang Xudong, defended the standards stating that the presence of dairy producers in the drafting committee was important because their livelihood potentially depended on it.⁵⁵ In addition, advocates of the new standard and the dairy farmers believe that the reduced standard is a practical compromise in light of China's small scale milk production and different feeding environments, which reflect large disparities in the types and quality of dairy cows within the dairy industry.⁵⁶ Nevertheless, this compromise does not affect the increased controls for melamine contamination, which requires manufacturers to keep complete records of inputs and to test all dairy products for melamine prior to distribution.⁵⁷

C. Increased Penalties For Non-Compliance

China's reaction to frequent food safety violations has been increasingly resolute and the administration continuously imposes harsher punishments against food safety violators and corrupt or underperforming food inspection agencies and government officials.⁵⁸

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Dairy and Products Annual, GAIN Report (Oct. 22, 2010), *available at* <http://gain.fas.usda.gov>. See also Dexter Roberts, *China Sets Up a Food Safety Super-Regulator*, BLOOMBERG BUSINESSWEEK, March 14, 2014, <http://www.businessweek.com/articles/2013-03-14/china-sets-up-a-food-safety-super-regulator> ("China is home to an estimated 200 million families that farm, each cultivating an average plot of 1.5 acres, as well as a half-million food processing companies, most with fewer than 10 employees. The small scale of most agriculture and food processing means the owners have limited resources to invest in the advanced techniques that could ensure better quality.")

⁵⁷ Id.

⁵⁸ Fang, *China court upholds death sentences in milk scandal*, XINHUA, March 26, 2009, http://news.xinhuanet.com/english/2009-03/26/content_11078553.htm.

In line with the central government's severe punishment agenda, the FSL subjects food manufacturers and distributors, who engage in illegal food production or trading, to confiscation of illegal gains and benefits, including food and food additives illegally produced or traded, as well as tools and equipment used during the illegal food production or trading.⁵⁹ In addition, the law imposes penalties and fines on the violators and authorizes revocation of business licenses, either temporarily or permanently.⁶⁰ In the same year the FSL was passed, China has revoked 6,045 food production licenses from 5,654 producers, reflecting major governmental efforts to improve food safety in the country.⁶¹

Acknowledging that corruption and bribery have plagued China's food industry for the past several years,⁶² the NPC included provisions in the FSL addressing these issues.⁶³ Specifically, the provisions direct higher authorities to revoke the certificates of qualification from food inspection agencies or personnel issuing fraudulent inspection reports or publishing false advertising.⁶⁴ The provisions also authorize the removal or dismissal of the managers or the personnel directly involved in the fraud or false advertising.⁶⁵ To further insure that the food inspection agencies comply with the set standards, the FSL prohibits managers or personnel directly involved in fraudulent inspection reports to work as food inspectors for ten years after the incident.⁶⁶ Similarly, if local government officials or regulatory executive departments fail to perform their duties in accordance with the law, abuse their authority or engage in corruption,

⁵⁹ Food Safety Law, *supra* note 4, art. 84.

⁶⁰ *Id.* art. 84-97.

⁶¹ Zhu Zhe, *6,045 food licenses revoked for quality problems*, CHINADAILY, Jan. 7, 2010, http://www.chinadaily.com.cn/china/2010-01/07/content_9281069.htm.

⁶² See, Bin Dong and Benno Torgler, *The Causes of Corruption: Evidence from China* (June 21, 2010), FEEM Working Paper No. 72.2010, available at SSRN: <http://ssrn.com/abstract=1628107> ("The Chinese Government has admitted that corruption "is now worse than during any other period since New China was founded in 1949. It has spread into the Party, into Government administration and into every part of society, including politics, economy, ideology and culture.")

⁶³ Food Safety Law, *supra* note 4, art. 91-93.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

and a serious food safety incident occurs, the FSL demands removal, demotion or dismissal of those directly responsible.⁶⁷

In addition to fines and removal of responsible parties, the FSL subjects any violator, who commits a serious food safety violation to criminal prosecution.⁶⁸ Although, the FSL does not directly discuss criminal penalties, it does refer to the application of the Criminal Law of China.⁶⁹ On February 25, 2011, Hu Jintao, China's former top official, announced the 8th Amendment to the Criminal Law of China.⁷⁰ The amendments came into force on May 1, 2011⁷¹ and included several significant food safety revisions, such as Article 143,⁷² 144⁷³ and 408A⁷⁴.

Under the revised Law, food producers and distributors, who produce or sell unsafe foods, which might cause any serious food poisoning or a serious food borne disease will face up

⁶⁷ Id. art. 95. (The relevant authorities include authority for supervision and authority for appointment and dismissal.)

⁶⁸ Id. art. 98.

⁶⁹ Id.

⁷⁰ Amendment (VIII) to the Criminal Law of the People's Republic of China (herein "Criminal Law Amendment III"), Adopted at the 19th Meeting of the Standing Committee of the Eleventh National People's Congress of the People's Republic of China (Feb. 25, 2011), *available at* <http://27.151.119.113/cms/html/english/2011-12-12/258191.html>.

⁷¹ Id.

⁷² Id. (Article 143 states: "Whoever produces or sells food not up to the food safety standards which may cause any serious food poisoning accident or any other serious food-borne disease shall be sentenced to imprisonment of not more than 3 years or criminal detention and a fine; if any serious damage is caused to the people's health or there is any other serious circumstance, shall be sentenced to imprisonment of not less than 3 years but not more than 7 years and a fine; or if there are especially serious consequences, shall be sentenced to imprisonment of not less than 7 years or life imprisonment and a fine or forfeiture of property.")

⁷³ Id. (Article 144 is amended as: "Whoever mixes poisonous or harmful non-food raw materials into food produced or sold or knowingly sells food mixed with poisonous or harmful non-food raw materials shall be sentenced to imprisonment of not more than 5 years and a fine; if any serious damage is caused to the people's health or there is any other serious circumstance, shall be sentenced to imprisonment of not less than 5 years but not more than 10 years and a fine; or if any human death is caused or there is any other especially serious circumstance, shall be punished according to the provisions of Article 141 of this Law." Paragraph 1 of Article 141 is amended as: "Whoever produces or sells bogus drugs shall be sentenced to imprisonment of not more than 3 years or criminal detention and a fine; if any serious damage is caused to the people's health or there is any other serious circumstance, shall be sentenced to imprisonment of not less than 3 years but not more than 10 years and a fine; or if any human death is caused or there is any other especially serious circumstance, shall be sentenced to imprisonment of not less than 10 years, life imprisonment or death penalty and a fine or forfeiture of property.")

⁷⁴ Id. (Article 408A: "Where a state functionary with food safety supervision and management functions abuses his powers or neglects his duties, if any serious food safety accident or other serious consequence is caused, he shall be sentenced to imprisonment of not more than 5 years or criminal detention; or if any especially serious consequence is caused, be sentenced to imprisonment of not less than 5 years but not more than 10 years.")

to three years in prison.⁷⁵ If the unsafe food causes a serious damage to the people's health, the sentence will be increased to up to seven years, and in extraordinarily serious cases even beyond seven years.⁷⁶ The punishment is more severe for those who "mix poisonous or harmful non-food raw materials into food produced or sold or knowingly sell food mixed with poisonous or harmful non-food raw materials."⁷⁷ Those individuals can face life imprisonment and even death penalty in the most severe situations.⁷⁸ Recognizing a growing prevalence of corruption in China's food industry,⁷⁹ the amendments impose criminal penalties of up to ten years on state regulators with food safety supervision and management authority, who knowingly abuse their power or negligently abandon their duties as regulators.⁸⁰

These amendments were implemented to protect "people's livelihood" according to the statements by the NPC's Commission for Legislative Affairs, and ensure that the violators are held accountable for their criminal acts.⁸¹ Nevertheless, the initial reports indicate that despite the harsh punishments under China's Criminal Law, the country is still struggling to solve its food safety crisis, as evidenced by countless reports of food safety violations since the passage of the FSL.⁸²

II. Limits of the 2009 Food Safety Law

The previous section explored several key provisions in the FSL that have had the highest impact on the Chinese food industry. However, the FSL has several weaknesses that limit its

⁷⁵ Id, art. 143.

⁷⁶ Id.

⁷⁷ Id. art. 144. See also Wang Guanqun, *Two executed in China over tainted milk scandal*, XINHUA, Nov. 24, 2009, http://news.xinhuanet.com/english/2009-11/24/content_12530798.htm.

⁷⁸ Id.

⁷⁹ See Dong, *The Causes of Corruption: Evidence from China*, *supra* note 62.

⁸⁰ Criminal Law Amendment III, *supra* note 70, art. 408A.

⁸¹ Helena Bottemiller, *China Considers Tougher Food Safety Penalties*, FOOD SAFETY NEWS, Dec. 22, 2010, http://www.foodsafetynews.com/2010/12/china-considers-upping-criminal-food-safety-penalties/#.UToeG_Mo6Uk

⁸² See John Ruwitch, *China's Yili recalls tainted milk powder, shares slump*, REUTERS, June 15, 2012, <http://www.reuters.com/article/2012/06/15/us-yili-recall-idUSBRE85E0DC20120615>. See also, Huang, *supra* note 2.

success in ensuring national food safety. This section fosters a detailed discussion of some of the major limitations of the FSL, which include problems with the uniformity of food safety standards, the challenges associated with having a high number of regulatory agencies, and the FSL's difficulties in providing sufficient and effective incentives to discourage food safety violations.

A. Problems With the Uniformity of Food Safety Standards

The FLS's mandatory national food safety standard system signifies a substantial progress toward ensuring China's food safety. However, there is more work to be done. China's 12th Five-Year Plan, even though aspirational, provides a framework for areas in the FSL that require improvement.⁸³

China's central regulatory departments acknowledged in the 12th Five-Year Plan for National Food Safety Standards that China's current standards for food safety are restrained by the fast-paced development and risk assessment of the food industry.⁸⁴ To put it differently, safety standards that are presently in place do not match food industry's developments. This can create substantial challenges for the regulators in trying to identify whether a food company produces food that is, in fact, safe. The FSL offers only a limited guidance in this regard. Specifically, the FSL emphasizes the need for "scientific, reasonable, safe and reliable" national standards.⁸⁵ However, there is no mandate as to how recent the scientific basis for the standards

⁸³ 12th Five-Year Plan, *supra* note 49.

⁸⁴ *Id.*

⁸⁵ Food Safety Law, *supra* note 4, art. 18.

should be. This leaves regulators enforcing standards that are outdated and lack generality and risk assessment.⁸⁶

Another difficulty facing the regulators and inspection agencies is the patchwork of duplicative, overlapping and inconsistent standards.⁸⁷ This problem traces back to the period before the FSL's promulgation, when different ministries separately developed food safety standards pursuant to their portfolios, without ever cross referencing them with other ministries.⁸⁸ Even though there is some effort in the FSL to require consolidation of national food safety standards by the MOH among existing quality and safety standards in Articles 22 and 23, there are still many national standards that are either lacking, inconsistent, overlap or are duplicates of already existing standards.⁸⁹

To complicate the matters, the FSL explicitly allowed local governments in autonomous regions and at the provincial and municipal levels,⁹⁰ as well as food enterprises, to develop local and industry food safety standards, in areas where the MOH failed to develop national standards.⁹¹ Such an explicit authorization creates a risk that local and industry standards will be used to protect local industries.⁹² Local officials may have the incentive to either keep local food safety standards low, or rely on the lack of national standards and not see the necessity to

⁸⁶ Ching-Fu Lin, *Global Food Safety: Exploring Key Elements for an International Regulatory Strategy*, 51 Va. J. Int'l L. 637, at 650-651, Jan. 29, 2011.

⁸⁷ Lina, *supra* note 8.

⁸⁸ Gordon Fairclough, *U.N. Criticizes China on Food Safety*, WALL ST. J., Oct. 23, 2008, <http://online.wsj.com/article/SB122470185058359197.html>.

⁸⁹ Lina, *supra* note 8. (Health Minister Chen Zhu admitted that amid numerous food safety scandals, China's food safety standards are in urgent need of improvement. Chen said that "the total number of national food standards, local standards and food-producing industrial standards has topped 5,000. Among them, many overlap or contradict each other, he added, pointing to the motivation behind the Ministry of Health's announcement last month that it will overhaul and streamline the current food standards list.")

⁹⁰ ChinaToday Home Page, http://www.chinatoday.com/city/china_municipalities.htm (last visited Apr. 4, 2013) (China has four municipalities, twenty three provinces and five autonomous regions.)

⁹¹ Food Safety Law, *supra* note 4, art. 24,25

⁹² Ellen Peirce, and Marisa Pagnattaro, *From China to Your Plate: An Analysis of New Regulatory Efforts and Stakeholder Responsibility to Ensure Food Safety*, 2009, at 12, available at SSRN: <http://ssrn.com/abstract=1565511>.

implement standards in the first place, creating an uncertain environment for food safety.⁹³

Accordingly, a national food safety system that is inaccurate, incomplete and not-uniform is likely to cause oversight failures, with potentially tragic outcomes.⁹⁴

Quite often, in developing countries, like China, food safety standards are less effective because they often lack technical and institutional capacity for effective enforcement.⁹⁵ However, China's situation can be improved. The 12th Year-Plan recommends developing national uniform standards for detection methods and food packaging materials, as well as improving basic research and risk assessments.⁹⁶ China also needs to develop a "safeguarding mechanism" by establishing a full time technical organization for national food safety standards that is adequately funded and employs a competent panel of skilled researchers and professionals.⁹⁷ Even though this may create an additional layer of bureaucracy, China needs to cultivate a competent standard team of professionals and a standard research capacity to ensure effective and uniform food safety standards that are in line with industry developments and risk assessments.

Despite the problems with the national food standards in the FSL, China does not blindly ignore its weaknesses, but in fact recognizes the importance of high food standards as the means to regain the trust within China as well as in the international community. Thus, it is particularly promising that China now actively participates in formulation of the international food codex,

⁹³ Id.

⁹⁴ Id.

⁹⁵ Lin, *supra* note 86, at 658. ("Inadequate technical infrastructure - in terms of food laboratories, human and financial resources, national legislative and regulatory frameworks, enforcement capacity, management and coordination - weakens the ability to confront these challenges.")

⁹⁶ 12th Five-Year Plan, *supra* note 49.

⁹⁷ Id.

where it develops a plan with other countries for how to improve food safety and the quality of pesticide products.⁹⁸

B. Too Many Agencies in Charge of Enforcing China's Food Safety Standards

In the wake of the melamine crisis, health experts have put the blame for the failure to detect food safety problems, on China's "disjointed" government structure.⁹⁹ The World Health Organization's former top food-safety official, Jorgen Schlundt, emphasized in 2008 before the passage of the FSL that China's authority for food-safety enforcement is "dispersed" among too many agencies and different levels of government.¹⁰⁰ Essentially, China's regulatory agencies operated vertically and failed to communicate or exchange crucial information, which lead to substantial loopholes in China's regulatory system.

To solve this problem, the FSL directed the State Council to establish the FSC to supervise and coordinate the work of regulatory departments under the State Council.¹⁰¹ The creation of the FSC represented a significant milestone for China, in trying to improve its food safety monitoring system. However, the FSL stopped short of reducing or consolidating the number of regulatory agencies. It merely defined their duties with more specificity.¹⁰² According to China's Health Minister, Chen Zhu, there are currently too many regulatory agencies that are

⁹⁸ *Work Sharing, Harmonization, and Technical Assistance, China Collaboration*, EPA, <http://www.epa.gov/oppfead1/international/worksharing/index.html> ("Areas of focus include pesticide registration processes and requirements, risk assessment and management procedures and policies, residue chemistry requirements, good laboratory practices for conducting studies, and pesticide usage.") (last visited Apr. 4, 2013).

⁹⁹ Fairclough, *supra* note 88.

¹⁰⁰ *Id.*

¹⁰¹ Food Safety Law, *supra* note 4, art. 4. See also Shan Juan, *New department devoted to food safety*, CHINADAILY, March 5, 2013, http://www.chinadaily.com.cn/food/2013-03/05/content_16278075.htm.

¹⁰² *Id.* art. 4,13,14.(The FSL puts the MOH, GAQSIQ, SAIC, and SFDA in charge of the overall food safety coordination, food production, food distribution and catering services, respectively. The FSL also directs the MOH to evaluate food safety risks, formulate food safety standards, issue public notifications on food safety, develop accreditation norms for food testing agencies and investigate major food safety incidents. The MOH has the leading role in handling food safety issues, however, other agencies are also involved.)

in charge of implementing approximately 5,000 overlapping and contradictory food safety standards, which include national, local and industry standards.¹⁰³

Institutional overabundance is often plagued by regulatory overlap, and increased potential for oversight loopholes.¹⁰⁴ In addition, having many regulators with overlapping authorities unnecessarily raises the cost of regulation.¹⁰⁵ Thus, under the current FSL, an enterprise that not only produces food, but also distributes and offers catering services is subject to the regulatory oversight by three different agencies. To remove duplicative jurisdiction and economize government funds while continuing to protect people's health, a new rule needs to be developed that would effectively streamline China's food safety efforts.

In mid-March of this year, Mr. Ma Kai, China's State Council secretary-general, told the NPC that the State Council will reduce the number of ministries and commissions from 27 to 25 and reorganize several administrative agencies because even though "the State Council has established a framework that meets the needs of the socialist market economy, [it] still has notable shortcomings".¹⁰⁶ One of the changes is the incorporation of the SFDA and the State Food Safety Office into a food and drug administration that will address increasing public concerns about food safety.¹⁰⁷ The reason for the seventh restructuring attempt in the past thirty years is central government's concern about "duplications of functions, overlapping management, low efficiency and bureaucracy", which to some degree have facilitated instances of corruption and dereliction of duty.¹⁰⁸

¹⁰³ Lina, *supra* note 8.

¹⁰⁴ Lina, *supra* note 86, at 651.

¹⁰⁵ *Id.*

¹⁰⁶ Fu Shuangqi, *China unveils plan to streamline gov't*, XINHUA, March 10, 2013, http://news.xinhuanet.com/english/china/2013-03/10/c_132222066.htm.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

At the local level, the regulatory problems caused by the myriad of executive regulatory departments are even more pronounced and the FSL does a relatively poor job of addressing those problems. Essentially, the FSL places the authority with the local people's governments at and above county level to establish and enforce a food safety accountability system, and oversee and coordinate the regulatory food safety agencies within their respective jurisdictions.¹⁰⁹ The agencies must in turn coordinate with each other and implement and enforce the law.¹¹⁰ Promising on the paper, but challenging in reality, local governments often lack the capacity¹¹¹ and/or the incentive¹¹² to establish effective oversight. Yet, despite the FSL's well-intended mandates directing local governments to formulate and submit emergency plans within their jurisdictions to the higher level government in case of serious food safety violations, the FSL has not been every effective in addressing the issue of resources and incentives.¹¹³

Thus, even though the creation of the FSC and the recent attempts by the State Council to restructure current administrative institutions, are "good example[s] of China's institutional reform and would facilitate the enforcement of laws and regulations to ensure food safety,"¹¹⁴ a

¹⁰⁹ Food Safety Law, *supra* note 4, art. 5.

¹¹⁰ *Id.*

¹¹¹ Thompson and Ying, *Food Safety in China: New Strategies*, GLOBAL HEALTH GOVERNANCE, Vol, 1, No. 2, 2007, at 4. ("Like many things in China, the scope of the food processing industry is huge and hard to measure [with approximately 1 million food producers, 70 percent of which employing less than 10 persons]. Regulating these small and mobile processors is difficult, particularly as the task generally falls on township and county-level officials, rather than better funded and trained provincial and municipal administrators. These micro-enterprises, often family businesses, are run out of homes or small rental spaces and have little access to technology, are often unknowledgeable about food safety science and international standards.")

¹¹² *Id.* at 6 ("Unscrupulous local officials can benefit from illegal or unlicensed manufacturers, creating a disincentive to shutting down violators. Local governments, particularly in poor regions are reliant on fines for income generation, particularly where legitimate tax revenues are inadequate to support government operations. Shutting down an illegal manufacturer effectively cuts off a valuable revenue stream, giving the local officials incentive to "tax" violators, while simultaneously allowing them to continue operating and generating sales revenues. Additionally, local officials are concerned that shutting down employers or denying farmers the ability to make a living can cause social unrest, a state all officials are under pressure to avoid.")

¹¹³ Food Safety Law, *supra* note 4, art. 70.

¹¹⁴ Shan Juan, *New department devoted to food safety*, CHINADAILY, http://www.chinadaily.com.cn/food/2013-03/05/content_16278075.htm (last updated March 05, 2013).

more streamlined line approach of consolidating or eliminating agencies is needed to reduce oversight loopholes, eliminate overlap between agencies and decrease the cost of regulations.

C. The FSL Fails to Provide Incentives for Compliance

Overall, the FSL does a relatively good job in establishing what activities are illegal and when individuals, who engage in illegal activities, are subject to civil sanctions or criminal penalties. Similarly, the FSL correctly recognizes the weakness in the Chinese food industry and addresses violations at the food production and distribution levels, as well as corruption problems at the administrative level. However, the law has several noteworthy shortcomings.

One limitation is China's inconsistent enforcement of the FSL. Under Article 95 of the FSL, if local government officials at the county level or above neglect their duties under the law, engage in fraud or corruption and directly cause a food safety incident that has a "serious impact on society," they must be removed from office.¹¹⁵ The language used in this Article implies that if the safety incident is not serious, yet a government official has neglected his or her duties under the FSL, committed fraud or has been involved in corruption, the official will nonetheless be able to retain the current position. In light of the high prevalence of corruption and fraud,¹¹⁶ it is rather disappointing that the FSL seemingly qualifies the severity of the health hazard. In other words, a corrupt official will remain in office provided that the food safety incident does not result in casualties. In practice, there is a lack of uniformity in the enforcement of the law. Whereas some government officials, involved in food safety incidents, escape criminal prosecution,¹¹⁷ others receive harsh punishments.¹¹⁸

¹¹⁵ Food Safety Law, *supra* note 4, art. 95. (If the officials or executives are found to have violated the law and committed a crime, they can also be subject to criminal prosecution pursuant to Art. 98.)

¹¹⁶ See, Bin Dong, *The Consequences of Corruption: Evidences from China*, Queensland University of Technology, June 22, 2010, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1628567.

¹¹⁷ Sky Canaves, *New Jobs for Officials Punished in China's Milk Scandal*, WALL ST. J., Apr. 10, 2010, <http://blogs.wsj.com/chinarealtime/2009/04/10/new-jobs-for-officials-punished-in-chinas-milk-scandal/> (Even though, dozens of people were arrested in connection with the melamine incident, not a single government official

Another limitation is evident from the FSL's inability to effectively deter food safety violations. At the time the FSL was promulgated, the goal was to insure that cases like melamine in the infant formula and clenbuterol contaminated meat will never be repeated. Accordingly, to prevent frequent episodes of food safety violations, the FSL focused its attention on harsh punishments of individuals, who violate the law.¹¹⁹ Even though severe penalties are crucial to achieve justice for the victims and are helpful in deterring violations, it is equally important to provide positive incentives to individuals, organizations, regulatory agencies and local government officials to comply with the law and ensure a safe and healthy food industry.

Nevertheless, the FSL has not devoted sufficient attention to actual incentives for individuals to refrain from committing food safety violations.¹²⁰ This is not to say that the law is completely ignorant to the importance of educating individuals involved in food production about food safety.¹²¹ However, the FSL lacks provisions urging individuals involved in the food business that compliance with the law will not only benefit consumers, but will offset the cost of compliance and ensure higher returns for the food manufacturers and traders in the long run.

was among them. Bao Junkai, former deputy director general of the food production supervision department of AQSIQ, who was disciplined for "slack supervision," later accepted a position as a party secretary and head of AQSIQ's Anhui province bureau. Similarly, Liu Daqun, former director of the agricultural department in Hebei province, was appointed as mayor and deputy party secretary of the city of Xingtai. See also, *Xingtai mayor under probe after corruption*, CHINADAILY (Dec. 18, 2012), http://usa.chinadaily.com.cn/china/2012-12/18/content_16029902.htm.) (Ironically, Liu Daqun recently resigned as a mayor, after accusation in an online post appeared in December 2012 of accepting 5 million yuan (\$800,000) from a real estate developer and 8 million yuan from a road project contractor.)

¹¹⁸ Li Qian, *Dead, sick pigs used for pork with 2 officials' OK*, SHANGHAI DAILY, July 17, 2012, <http://www.shanghaidaily.com/nsp/National/2012/07/18/Dead%2Bsick%2Bpigs%2Bused%2Bfor%2Bpork%2Bwith%2B2%2Bofficials%2BOK/> (Two food safety officials, Gong Jinlong, a director with Yiwu Food Co in charge of business operation, and his cousin Gong Yihua, a local animal quarantine official, have been prosecuted for taking bribes to help vendors buy ill and dead pigs. They were charged with fabricating nearly 30 certificates of origin and causing 500 unfit pigs to be sold on the market.)

¹¹⁹ See section I, subsection C *supra*.

¹²⁰ Food Safety Law, *supra* note 4, art. 84-98.

¹²¹ *Id.* art. 32. (The FSL does for example direct food manufacturers and distributors to strengthen the training of the employees on food safety knowledge.)

The main problem the Chinese food industry faces is the lack of trust in the safety of the Chinese products.¹²² In addition to poisoned food products, China has also seen an alarming growth of counterfeit products in the recent years, such as counterfeit medicine,¹²³ eggs¹²⁴ and infant formula.¹²⁵ As a result, a growing number of foreign food and dairy companies either already entered or are in the process of entering and establishing their presence in China¹²⁶ in order to exploit customers' fear of locally produced products.¹²⁷ Food safety is no longer a burden, but rather a marketing strategy for forward looking companies seeking long-term profits.¹²⁸

¹²² *Food, drug industries facing credibility crisis*, CHINADAILY, http://www.chinadaily.com.cn/bizchina/2011-05/05/content_12451201.htm (last updated May 5, 2011).

¹²³ Jeanne Whalen and Benoit Faucon, *Counterfeit Cancer Medicines Multiply*, WALL ST. J., Dec. 31, 2012, <http://online.wsj.com/article/SB10001424127887323320404578211492452353034.html>. ("Counterfeiters are targeting cancer drugs because of the big profits to be made. While pills such as Viagra, long a favorite of the counterfeit trade, cost about \$15 to \$20 a tablet, a 400-milligram vial of the injectable drug Avastin costs about \$2,400.") See also Hou Qiang, *Authorities crack 14,000 counterfeit drug cases in 2012*, XINHUA, Feb. 20, 2013, http://news.xinhuanet.com/english/china/2012-04/02/c_131503411.htm. (Last year, the SFDA has intensified its efforts of cracking down on counterfeit food and medicines. "The SFDA and the Ministry of Public Security jointly issued a guideline calling for enhanced coordination between the two agencies in tackling drug-related offences. The guideline highlighted prompt exchange on intelligence and quick reaction in performing duties." In joining its efforts with the Ministry of Public Security ("MPS"), the SFDA has captured more than 20,000 individuals involved in 14,000 cases suspected of producing and trading counterfeit medicine in 2012. As a result, twenty-eight companies were shut down and 228 suspects were arrested for making capsules and gelatin products containing excessive chromium.)

¹²⁴ Batrick Boehler, *Bad Eggs: Another Fake-Food Scandal Rocks China*, TIME, Nov. 06, 2012, <http://newsfeed.time.com/2012/11/06/how-to-make-a-rotten-egg/> (Guangming Daily reported: "On Sunday, a woman who gave her name as Ms. Tian was shopping at a vegetable market in Luoyang, in central China's Henan province, when she noticed a van selling eggs for about 6¢ cheaper than they were going for in supermarkets. Assuming that the eggs were from a countryside seller not aware of city prices, she took her chances and bought 2.5 kg of the bargain eggs — which turned out to be fakes." According to an anonymous source, the "eggs" were entirely manufactured using a mold for a proper shape.)

¹²⁵ Matt Siegel, *Chinese Safety Concern Empties Distant Shelves*, N.Y. TIMES, Jan. 7, 2013, <http://www.nytimes.com/2013/01/09/world/asia/infant-formula-shortage-in-australia-tied-to-chinese-hoarding.html>.

¹²⁶ Lucy Hornby and Jane Lanhee Lee, *China Lures Global Dairy Producers*, N.Y. TIMES, June 18, 2012, <http://www.nytimes.com/2012/06/19/business/global/19iht-inside19.html?pagewanted=all>. ("Global food and dairy companies are making another round of big bets on the fast-growing Chinese dairy sector, seeking to position themselves as safe alternatives after a scandal over deaths from baby formula burned the industry four years ago. They are lured by projections of 10 percent annual growth for the sector and by Chinese consumers' willingness to pay a premium for foreign brands as they remain wary of local brands' safety records.")

¹²⁷ Id. See also Siegel, *supra* note 125.

¹²⁸ Hornby, *supra* note 126.

To prevent losses to China's food industry due to the tarnished reputation of its domestic products,¹²⁹ the FSL must increase its efforts to persuade food manufacturers, and traders that food safety is in everyone's interest in the long run and develop a system for discouraging government officials and regulators from taking bribes.¹³⁰

III. China's Obstacles In Enforcing The Food Safety Law

The first two sections of this article have analyzed the FSL, identified its weaknesses and made several proposals for how the new law can be improved. The rest of the paper will focus on the enforcement obstacles the Chinese government faces in implementing and enforcing the FSL. Essentially, the paper argues that even if the FSL's shortfalls are cured, the Chinese government will remain unable to enforce the law due to the following three impediments: China's local economic protectionism; Corruption, unscrupulous practices and deteriorating moral integrity; and Environmental influences on food safety.

A. China's Local Economic Protectionism

In order to fully understand how local protectionism undermines successful implementation of the FSL, it is critical to appreciate China's centralized government structure. Chinese government is comprised of a central government located in Beijing and a four-level hierarchical organizational system of local governments, consisting of provinces, counties, cities

¹²⁹ Id. See also *Chinese fish crisis shows seafood safety challenges*, USATODAY, http://usatoday30.usatoday.com/money/industries/food/2007-06-28-fish-cover-usat_N.htm. (last updated July 1, 2007) (Chinese seafood crisis in 2007 has caused huge losses for the fish industry in China. EU and U.S. have placed temporary bans on Chinese fish imports.)

¹³⁰ Lijuan Zhang, *Boost subsidies to save China's farms*, China.org, March 11, 2010, http://www.china.org.cn/opinion/2010-03/11/content_19588079.htm (The FSL could for example provide greater incentives to farmers by increasing farm subsidies. In the past, the Chinese government has invested "too little and squeezed too much from the farming sector. So today, Chinese agriculture lags far behind the country's fast growing economy and is becoming a costly bottleneck holding back its transitional economy."). See also Dong, *The Consequences of Corruption: Evidences from China*, and Canavas, *supra* notes 116, 117 (In addition, the FSL must focus on official corruption and provide clear and uniform punishment of government officials who take bribes.)

and townships.¹³¹ As noted in the Section I of this article, the NPC is the “highest organ of state power.”¹³² It has the authority to supervise the work of the State Council, which promulgates regulations and submits them to the NPC for the final approval.¹³³

At the local level, government officials are allowed to pass local laws and regulations, provided that those are approved by the central government.¹³⁴ The right to pass local laws and regulations can be traced back to China’s 1980s agricultural reforms, when China attempted to syndicate central planning and market-oriented reforms with the goal to increase production, achieve technological advancements and raise the standard of living.¹³⁵ To achieve the desired economic and social progress, China introduced the “household responsibility system.”¹³⁶ Through this system, land was distributed to the farmers, who were for the first time allowed to keep their harvest and submit land rent at a later time.¹³⁷ This development led to dramatic increases in China’s productivity.¹³⁸ At the same time, it led to profound changes in farmers/state relations, where the state lost its “direct control” over the farmers.¹³⁹ To retain some level of control, the state began to expand its state administrations at the local level and allowed the local

¹³¹ *China’s Political System*, CHINA.ORG, <http://www.china.org.cn/english/Political/28842.htm> (last visited Apr. 4, 2013).

¹³² See Lawrence, *supra* note 11.

¹³³ Id.

¹³⁴ Id at 8-9. (Central government allows the provinces to pass laws and regulations that expand national laws, however, it does not permit provincial laws and regulations that would be in conflict to the existing national laws and regulations. Also, local government are required to report directly to the State Council. Each of the four levels reports to the next higher level. So townships report to cities, cities report to counties, counties report to provinces and provinces report to the central government in Beijing. Also, provinces do not have their own constitutions and lack the power to appoint their own leaders. The central government in Beijing has the sole power to make appointments and promotions of provincial officials. To avoid concentration of regional power, Beijing periodically rotates provincial leaders from province to province.)

¹³⁵ Gregory C. Chow, *Economic Reform and Growth in China*, Peking University Press, 2004, at 129, available at <http://down.aefweb.net/AefArticles/aef050107.pdf>.

¹³⁶ He, Xin. *Ideology or Reality?: Limited Judicial Independence in Contemporary Rural China*, Australian Journal of Asian Law, Vol. 6, No. 3 [213]-230, Dec 2004, at 220 (Initially, the government institutions found their revenue streams through either increased taxes and fees for the farmers, or the lucrative township and village enterprises (“TVE’s”). The TVE’s were located in more developed townships and villages. In less developed communities, where there are no lucrative TVE’s, the farmers financed their local state institutions through higher taxes and fees.)

¹³⁷ Id.

¹³⁸ Chow, *supra* note 135, at 129.

¹³⁹ Xin, *supra* note 136, at. 220

governments to develop its regional economies and experiment with approved policy methods.¹⁴⁰

The reason behind this approval lies in the central government's overarching objective to increase China's economic growth.¹⁴¹ In other words, if local governments develop policies that help increase China's GDP, provided, of course, that they conform to Beijing's rules and regulations, China's central government will not stand in the way of local innovation.

Accordingly, both central and local governments play an important role in the formulation and implementation of food safety regulations. At the central level, the executive departments under the State Council must coordinate, evaluate food safety risks, formulate food safety standards, investigate major food safety incidents,¹⁴² and regulate food manufacturing, food distribution and catering services in accordance with the set national standards.¹⁴³ At the local level, though, the regional governments develop local standards and conduct food inspections. Regional governments stand on the forefront of food inspections and are utilized as enforcement vehicles for the national and local food safety standards. Accordingly, to ensure a successful and efficient implementation of the food safety standards, local governments' cooperation, accountability and integrity are fundamentally important.

However, there is a lot of skepticism about local official's integrity and accountability, mainly because local officials are appointed by the party members at the next higher level of government rather than elected by the people in their communities.¹⁴⁴ At the sub-national level of government, Chinese officials are promoted "almost entirely on the basis of their locality's

¹⁴⁰ Chow, *supra* note 135, at 220. (Today, nearly every central government institution has a "counterpart" at the local level.)

¹⁴¹ See Lawrence, *supra* note 11, at 8.

¹⁴² Food Safety Law, *supra* note 4, art. 4, 13, 14.

¹⁴³ *Id.*

¹⁴⁴ See Lawrence, *supra* note 11, at 9. (Also, provinces do not have their own constitutions and lack the power to appoint their own leaders. The central government in Beijing has the sole power to make appointments and promotions of provincial officials. To avoid concentration of regional power, Beijing periodically rotates provincial leaders from province to province.)

growth rates.”¹⁴⁵ Accordingly, local officials are expected to produce high GDP rates as a reflection of their regional economic success.¹⁴⁶ The pressure to maintain high economic growth and the lack of accountability to the local populace creates incentives for local officials to exaggerate their economic success,¹⁴⁷ and to exploit their communities at any cost.¹⁴⁸

The fiscal reality of the local governments creates an additional layer of confusion in the already muddled Chinese government system. When the central government began expanding its institutions after China’s agricultural reforms in the 1980s, it failed to provide sufficient financial resources to those institutions, forcing the local governments to look at alternative venues to get their revenues.¹⁴⁹ In today’s China, the local governments’ revenue greatly depends on the success of the local enterprises.¹⁵⁰ To put it differently, local officials have built symbiotic relationships with large local enterprises where both can reap the benefits from a mutual cooperation. Thus, local governments benefit from the economic developments that local businesses provide, whereas local businesses benefit because local officials are willing to close

¹⁴⁵ Carl Minzner, *Riots and Cover-Ups: Counterproductive Control of Local Agents in China*, Nov. 9, 2009, University of Pennsylvania Journal of International Law, Vol. 31, 2009, Washington U. School of Law Working Paper No. 09-11-01, at 66, available at SSRN: <http://ssrn.com/abstract=1502943>.

¹⁴⁶ Id. at 76 (There are some efforts by the Chinese central officials to “counteract incentives for local officials to grant approval to illegal and environmentally hazardous projects simply to improve their economic development scores” through the introduction of “Green GDP,” which is an environmentally-adjusted measure of economic growth. Nevertheless, local protectionism remains a big problem for China.) See also Eve Cary, *The Curious Case of China’s GDP Figures*, THE DIPLOMAT, March 5, 2013, <http://thediplomat.com/china-power/the-curious-case-of-chinas-gd-figures/> (“[T]here are structural political disincentives to reporting accurate GDP figures at the local level. Local officials are promoted almost entirely on the basis of their locality’s growth rates, giving them a huge incentive to report increasing GDP figures, no matter if they are or not. Environmental concerns have also created an incentive for officials to lie: higher growth rates, when paired with the amount of coal burned, give the province an appearance of greater energy efficiency.”)

¹⁴⁷ Minzner, *supra* note 145, at 56.

¹⁴⁸ Id. at 66. (The most prominent examples include forcing women to have abortion as a mean to achieve target goals for allowed number of births in local jurisdictions, and the 2008 melamine contaminated milk incident where local officials failed to timely report the incident.)

¹⁴⁹ Xin, *supra* note 136, at 221.

¹⁵⁰ Thompson, *supra* note 111, at 5.

their eyes on food inspections and food safety regulations.¹⁵¹ In addition, even if the central government passes new laws and regulations, local officials often complain that they do not have the needed financial resources to implement the new rules.¹⁵² Consequently, because local governments are allowed to develop their own economies and lack central government resources due to fiscal decentralization,¹⁵³ they have incentives to become overly protective of local businesses, which in large parts finance the local regions through high tax revenues.¹⁵⁴

One of the most prominent examples of local economic protectionism is the melamine tainted formula incident that killed six infants and injured close to three hundred thousand others.¹⁵⁵ At the center of the 2008 scandal was the Sanlu Group (“Sanlu”), a state owned Chinese dairy company based in Shijiazhuang, the capital of northern Hebei Province.¹⁵⁶ Prior to the melamine scandal, Sanlu was China's top seller of milk powder for 15 years.¹⁵⁷ The 2008 melamine controversy revolved around the industrial chemical melamine, an illegal food additive that is used to make fertilizer and industrial piping.¹⁵⁸ If consumed, melamine can cause kidney stones and kidney failure.¹⁵⁹ Despite its well-known effects,¹⁶⁰ the chemical has been added to watered-down milk to make it appear higher in protein content and sold to dairy companies.¹⁶¹

¹⁵¹ Id. (“Local officials are reluctant to close businesses that contribute to employment in rural areas, where other economic opportunities are limited. This reluctance to enforce standards or regulations set at the provincial or national level makes it unlikely that food safety can be ensured consistently across the country.”)

¹⁵² Id. (“Food safety enforcement is complicated by weak government capacity, particularly at local levels where many food processors operate. Often, new regulations and dictates from Beijing are unfunded mandates which are ignored by local officials who argue they lack resources to carry out directives. Where some local governments might have the will to enforce regulations and standards, they often lack the means.”). See also, Liyan Qi and Tom Orlik, *China's Local Governments Boost Borrowing*, WALL ST. J. (Jan. 14, 2013), <http://online.wsj.com/article/SB10001424127887324595704578241343520236634.html> (“China's local governments borrowed big in 2009 and 2010, taking debt levels to around 10.7 trillion yuan (\$1.7 trillion).”)

¹⁵³ See Lawrence, *supra* note 11, at 8. (Local governments can collect their own revenues and inject their profits into education, health, unemployment insurance, social security, and welfare.)

¹⁵⁴ Id.

¹⁵⁵ Gossner, *supra* note 3.

¹⁵⁶ Id.

¹⁵⁷ Id.

¹⁵⁸ Id.

¹⁵⁹ Id.

According to several published reports, Sanlu Group started receiving complaints about the adulteration of its milk with the illegal chemical as early as 2007, but failed to take any necessary steps.¹⁶² Instead, it approved the sale of 813 tons of melamine-tainted milk powder between August 2nd and September 12th of 2008, making a profit close to 47.5 million yuan (6.9 million U.S. dollars).¹⁶³ The officials in Shijiazhuang learned about the contaminated milk in August of 2008.¹⁶⁴ Shockingly, however, they withheld the information from the provincial government until September, so as not to interrupt the Beijing Olympics.¹⁶⁵ Unfortunately, by the time the officials initiated nationwide recalls of the tainted milk powder, the damage had already been done.¹⁶⁶

Investigations into the melamine scandal revealed that at least twenty two dairy companies had sold the melamine tainted formula in 2008 and possibly in 2007.¹⁶⁷ Dozens of people, implicated in the intentional adulteration of the milk formula were arrested, including milk dealers who sold the tainted milk and middlemen who actually added melamine to the watered down milk.¹⁶⁸ However, only twenty one individuals were held responsible for the

¹⁶⁰ David Barboza and Alexei Barrionuevo, *Filler in Animal Feed Is Open Secret in China*, N.Y. TIMES, Apr. 30, 2007, <http://www.nytimes.com/2007/04/30/business/worldbusiness/30food.html?pagewanted=all>. (In 2007, the melamine contaminated pet food killed dogs and cats in the United States.)

¹⁶¹ Gossner, *supra* note 3.

¹⁶² *Toll Soars Over Formula For Infants In China*, N.Y. TIMES, Dec. 2, 2008, <http://query.nytimes.com/gst/fullpage.html?res=9C0DE1DA143DF931A35751C1A96E9C8B63> (The reports refer only to the Sanlu Group. It is not clear who specifically received the complaints.).

¹⁶³ Bi Mingxin, *60 arrested over melamine-tainted Sanlu milk powder*, XINHUA, Jan. 11, 2009, http://news.xinhuanet.com/english/2009-01/11/content_10639141.htm.

¹⁶⁴ *Id.*

¹⁶⁵ Minzner, *supra* note 145 (“During the 2008 Beijing Olympics, for example, central authorities faced the need to maintain stability and uphold China’s external image in the face of international attention. They responded with a sweeping campaign setting severed career sanctions for any local Party or government officials whose actions let to outbreaks of protests or mass petitions.”)

¹⁶⁶ Gossner, *supra* note 3, See also David Barboza, *Death Sentences in Chinese Milk Case*, N.Y. TIMES, Jan. 22, 2009, <http://www.nytimes.com/2009/01/23/world/asia/23milk.html>. (“All the deaths in the scandal so far have been linked to Sanlu, which was found to have sold the milk products with the highest melamine concentrations.”)

¹⁶⁷ *China executes two over tainted milk powder scandal*, BBC NEWS, Nov. 24, 2009, <http://news.bbc.co.uk/2/hi/asia-pacific/8375638.stm> (Chinese government ordered the companies to pay a total of 1.1bn yuan (\$161m) to the hundreds of thousands of families involved.)

¹⁶⁸ Mingxing, *supra* note 163.

incident, with nineteen individuals sentenced to prison terms, including two suspended death sentences and two individuals receiving the immediate death penalties.¹⁶⁹ In addition, more than thirty government officials were fired, forced to resign or disciplined.¹⁷⁰ However, not a single government official was arrested or prosecuted.¹⁷¹

Many have blamed Beijing's lax policies on food safety for the melamine contaminated milk incident.¹⁷² Instead of accepting some responsibility, the central government initially placed the blame entirely on unscrupulous dairy company executives, farmers and middlemen.¹⁷³ However, on August 20, 2008, Hu Jintao, China's former top official, finally acknowledged that "[t]here are 'painful lessons' to be drawn from a series of health scares in China" and that "[t]hese incidents show that some officials have lost their sense of principals."¹⁷⁴ Not surprisingly, two days later, the State Council decided that the General Administration of Quality Supervision, Inspection and Quarantine ("GAQSIQ") had to take the "supervision responsibility

¹⁶⁹ Sharon Lafraniere, *2 Executed in China for Selling Tainted Milk*, N.Y. TIMES, Nov. 24, 2009, <http://www.nytimes.com/2009/11/25/world/asia/25china.html> (Two individuals, Zhang Yujun and Geng Jinping, had been executed over the scandal. Zhang Yujun was found guilty for endangering public safety by dangerous means, for selling more than 1.3 pounds of the tainted milk powder from July 2007 to August 2008. Geng Jinping, who managed a milk production center, was convicted of supplying milk containing melamine to the now-bankrupt Sanlu Group and other dairies.)

¹⁷⁰ *China court upholds death sentences in milk scandal*, *supra* note 56 ("Li Changjiang, then director of the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), resigned 'taking the blame for supervision default'. He was the highest-ranking official brought down by the scandal. Eight senior government officials from AQSIQ and ministries of agriculture and health among others, had been fired or disciplined for supervisory failure in the scandal []. The CPC disciplinary bodies of Hebei Province and Shijiazhuang City also recently announced punishments such as firing, demotion or warnings for a total of 24 local officials held responsible for the scandal.") See also Zhu Zhe, *Quality watchdog chief quits amid milk scandal*, CHINADAILY (Sept. 23, 2008), http://www.chinadaily.com.cn/china/2008-09/23/content_7048923.htm (In addition to Li Changjiang, the Party chief of Shijiazhuang was removed for his failure to report the scandal to the higher authorities in time and for his incompetent handling of the incident. Also, city mayor, Ji Chuntang, vice-mayor Zhang Fawang and three other officials had been removed earlier.)

¹⁷¹ Fang, *supra* note 58.

¹⁷² Fairclough, *supra* note 88 (Even though, the melamine incident occurred prior to the promulgation of the FLS, local protectionism remains a big issue post-FSL enactment, mainly because the FSL did not include any specific provisions addressing local protectionism and the problems associated with its.)

¹⁷³ Zhy Zhe, *Dairy farmers 'to blame' for poisoned milk*, CHINADAILY, http://www.chinadaily.com.cn/business/2008-09/13/content_7024911.htm (last updated Sept. 13, 2008) (Official blamed the unlawful dairy farmers for the contamination of the milk powder from Sanlu Group.)

¹⁷⁴ *China's president castigates local officials over milk scandal*, ABS-CBN (Sept. 20, 2008) <http://rp1.abs-cbnnews.com/world/09/20/08/chinas-president-castigates-local-officials-over-milk-scandal>

for the milk food contamination” and accepted the Li Changjiang’s resignation from the post of the GAQSIQ minister.¹⁷⁵ At his resignation Li Changjiang publicly apologized for the melamine tragedy.¹⁷⁶

The melamine scandal revealed the extent to which local officials are willing to go in order to protect large local employers, like Sanlu.¹⁷⁷ Local businesses help the local governments not only to develop the local economies through job creation and high tax revenues, but also to advance local official’s political careers.¹⁷⁸ According to a patent infringement investigator in China, “local governments are always watching out for their local companies and the bigger the company, the bigger the sway they’ll have.”¹⁷⁹ Despite the FSL’s effort to strengthen oversight and impose stricter food safety laws and regulations, there is no solution in the FSL for how to address the problem of local protectionism and officials’ self-serving incentives. Likewise, the FSL does not offer any fiscal solutions for how local governments can implement the new rules.¹⁸⁰ Consequently, as long as these problems remain unresolved, local protectionism will likely continue to be a serious obstacle to the FSL enforcement.

B. Corruption, Unscrupulous Practices And Deteriorating Moral Integrity

¹⁷⁵ Zhe, *Quality watchdog chief quits amid milk scandal supra* note 170.

¹⁷⁶ Id. (Li Changjiang: "I'm sorry for the contamination. We quality supervision authorities should bear unshirkable responsibility for it." After the apology, however, the GAQSIQ press officer stated that “the minister has always worked very hard, but the power of one person is limited” and that they are “very sorry to see him leave.” This statement raises doubts about accountability and implies that Li Changjiang was possibly a victim of China’s administrative system.)

¹⁷⁷ Minzner, *supra* note 145.

¹⁷⁸ Id.

¹⁷⁹ John Liu, *China Milk Scandal Shows Ties Between Companies, City Officials*, BLOOMBERG, Sept. 18, 2008, <http://www.bloomberg.com/apps/news?sid=aphp1fx8M0Mw&pid=newsarchive> (The investigator also added that investigators “never go to the local government when [] investigat[ing] a company” because “they’re no help or they’ll leak information to the company.”).

¹⁸⁰ See Thompson, *supra* note 111, at 5 (“Food safety enforcement is complicated by weak government capacity, particularly at local levels where many food processors operate. Often, new regulations and dictates from Beijing are unfunded mandates which are ignored by local officials who argue they lack resources to carry out directives. Where some local governments might have the will to enforce regulations and standards, they often lack the means.”) See also, Qi, *supra* note 142. (“China’s local governments borrowed big in 2009 and 2010, taking debt levels to around 10.7 trillion yuan (\$1.7 trillion).”)

Corruption has permeated every sector of the Chinese society, including “politics, economy, ideology and culture.”¹⁸¹ It presents one of the greatest obstacles to China’s development in terms of food quality and safety.¹⁸² The main problem is that corruption undermines government’s policies by encouraging opportunistic conduct of officials and private actors that result in the violation of the food safety regulatory laws.¹⁸³ Therefore, understanding the causes of corruption and establishing anticorruption policies is essential in ensuring an effective compliance with food safety laws and regulations.

On November 8, 2012, Hu Jintao, the former Chinese leader, cautioned in his speech at the 18th Party Congress that if China does not effectively deal with corruption, it could undermine and destroy China’s ruling Communist Party and the state.¹⁸⁴ Thus, “combating corruption and promoting political integrity, which is a major political issue of great concern to the people is a clear cut and long term political commitment of the Party.”¹⁸⁵

In cautioning about the destructive consequences of corruption, Hu Jintao called for a “system of combating corruption through both punishment and prevention” and stressed that the government should strengthen education about tackling corruption.¹⁸⁶ He also emphasized the necessity for a “system of accountability for improving Party conduct and upholding integrity” and warned that “all those who violate Party discipline and state laws, whoever they are and whatever power or official position they have, [] be brought to justice without mercy.”¹⁸⁷

¹⁸¹ See Bin Dong and Benno Torgler, *Corruption and Social Interaction: Evidence from China*, Feb. 7, 2011, FEEM Working Paper No. 9.2011, available at SSRN: <http://ssrn.com/abstract=1756843>, at 4.

¹⁸² Id.

¹⁸³ Id.

¹⁸⁴ Yang Lina, *Full text of Hu Jintao's report at 18th Party Congress*, XINHUA, Nov. 17, 2012, http://news.xinhuanet.com/english/special/18cpnc/2012-11/17/c_131981259_13.htm.

¹⁸⁵ Id.

¹⁸⁶ Id. (In addition, “government should improve the system of anti-corruption laws and prevent and fight corruption more effectively in a more scientific way and even to increase international anti-corruption cooperation.”).

¹⁸⁷ Id.

Despite the encouraging rhetoric, China's success at preventing corruption remains relatively low. The FSL's efforts to curtail the prevalence of corruption in the food industry are still rather limited.¹⁸⁸ There are several explanations for the relatively high prevalence of corruption in China.

Research suggests that corruption is high whenever bureaucrats have discretionary power associated with the "economic rents"¹⁸⁹ and the deterrence to such corruption, is lacking or "worth the risk".¹⁹⁰ Discretionary power increases with government size and the amount of regulations.¹⁹¹ However, on its own, it does not pose a significant threat. In order for discretionary power to lead to corruption, it must relate to economic rents.¹⁹² An important source of economic rent is the absence of competition in economic activities.¹⁹³ Thus, if competition increases, economic rents decline, eliminating the marginal benefit individuals gain from paying bribes.¹⁹⁴ In regards to deterrence of corruption, research shows that higher education and income, as well as the effectiveness of the country's legal system and press freedom affect the probability of detection of corruption.¹⁹⁵

¹⁸⁸ Mu Xuequan, *China investigates 57 government staff involved in food safety cases*, XINHUA, May 24, 2011, http://news.xinhuanet.com/english2010/china/2011-05/24/c_13890330.htm (In 2011, Chinese authorities have launched investigations on 57 government officials involved in food safety cases alone. On the one hand, the high number of investigations shows that the government is cracking down on corruption, however, it also shows that there is still high prevalence of corruption in China.)

¹⁸⁹ The Economist, *available at* <http://www.economist.com/economics-a-to-z/r>. (Economic rent is a measure of market power: the difference between what a factor of production is paid and how much it would need to be paid to remain in its current use.)

¹⁹⁰ Dong, *The Causes of Corruption: Evidence from China*, *supra* note 62 at 5-8. (Dong described deterrence to corruption as a function of the probability of being caught and the penalty for corrupt act. Thus, deterrence to corruption is low if the probability of being caught and/or the penalty for the corrupt act are low.)

¹⁹¹ Id. (Higher number of regulations promotes the incidence of corruption. In addition, increasing government size heightens the discretionary power by expanding the social resources.)

¹⁹² Id. ("Rational individuals will pay bribes only if they can get a higher marginal benefit from it.")

¹⁹³ Id.

¹⁹⁴ Id.

¹⁹⁵ Id. ("Higher level of income accelerates the spread of education and democratic institutions and therefore enhances individuals' political involvement. It consequently enables private individuals to better identify corrupt behavior and to punish the malfeasance of officials. As a result, regions with richer and more educated citizens are assumed to be less corrupt. [] In addition, "press freedom plays an important role in detecting corruption as independent journalists have incentives to investigate whether there is corruption.") See also Xiao Shu, *Dim Hopes*

In applying these research findings to China, local protectionism,¹⁹⁶ has provided significant insights into discretionary powers of local officials in developing local economies, and deciding what policies will benefit their local communities.¹⁹⁷ In addition, it shed light on how the symbiotic relationship between local officials and regional business enterprises promotes rent-seeking behavior, where corrupt officials often use their authority for personal gain.¹⁹⁸ Accordingly, discretionary power coupled with economic rents directly contributes to the pervasiveness of corruption. However, unless there is a serious food safety incident, official corruption often remains undetected.¹⁹⁹

One of the reasons for the high prevalence of corruption is the inconsistent application and enforcement of the laws. Whereas some officials receive harsh punishments, others escape prosecution altogether. For example, while Mr. Zheng Xiaoyu, a former SFDA chief, was executed for taking bribes in 2007, local officials involved in the 2008 melamine contaminated milk incident, have completely escaped criminal prosecutions.²⁰⁰ Even though the local officials chose to engage in a cover-up weeks before the story went to print and admitted the oversight failures, including the obligation to report the incident to the higher authorities, not a single one of them was criminally charged.²⁰¹ As such, the inconsistent application of the laws creates a perception that the probability of being caught for corrupt acts is relatively low.

for a Free Press in China, N.Y. TIMES, Jan. 14, 2013, http://www.nytimes.com/2013/01/15/opinion/dim-hopes-for-a-free-press-in-china.html?_r=0 (Freedom of the press is rather limited in China even though there are recent pushbacks from journalists demanding more freedom in “evaluating news according to journalistic significance rather than party interests.” Nevertheless, most of Chinese news organizations are controlled by the state.)

¹⁹⁶ See *supra* Part III, subsection A of this paper

¹⁹⁷ See Chow, *supra* note 135, at 135.

¹⁹⁸ John Mukum Mbaku, *Corruption and Rent Seeking, THE POLITICAL DIMENSION OF ECONOMIC GROWTH* (S. Borner and M. Paldam eds., London: Macmillan/St. Martin’s Press, 1998), available at rent-seeking behavior and corruption pdf. (“Bureaucratic corruption is primarily a rent-seeking behavior that is related to the scope and extent of government intervention in private exchange.”)

¹⁹⁹ Dong, *The Causes of Corruption: Evidence from China*, *supra* note 62 at 5-8.

²⁰⁰ Fang, *supra* note 58. See also *Former SFDA chief executed for corruption*, CHINADAILY, http://www.chinadaily.com.cn/china/2007-07/10/content_5424937.htm (last updated July 10, 2007).

²⁰¹ Liu, *supra* note 179.

However, in regards to the penalties for corrupt acts, China has shown greater consistency. China has one of the most rigorous punishment systems in the world, executing thousands of prisoners each year.²⁰² One of the well-publicized executions of a central government official was the case of Zheng Xiaoyu, a former SFDA chief, who was executed in 2007 after being found guilty of corruption.²⁰³ Zheng Xiaoyu worked as a head of the SFDA from 1998 until 2005, when he was charged and found guilty for taking bribes to approve inferior medications, such as an antibiotic that was found to have caused the death of at least ten individuals.²⁰⁴ The court sentenced him to death with a two-year reprieve.²⁰⁵ However, after the two-year suspension, in an unusual turn of events, the Supreme Court ordered his immediate execution.²⁰⁶ Such an extraordinarily harsh punishment of a central government official was unusual, even for China. Yet, it reflected on Beijing's determination to maintain a perception of integrity and a commitment to its own people that no official, no matter how high the rank, can escape from justice.²⁰⁷

Showing their efforts to crackdown on corruption, four Chinese government agencies have jointly released a circular in 2010, endorsing harsher punishment for food safety crimes.²⁰⁸ The circular promised more severe punishments for corrupt government officials who accept

²⁰² Max Fisher, *Capital Punishment in China*, THE ATLANTIC, Sep. 22, 2011, <http://www.theatlantic.com/international/archive/2011/09/capital-punishment-in-china/245520/>.

²⁰³ *Former SFDA chief executed for corruption*, supra note 200.

²⁰⁴ Id. ("Investigators found Zheng and his subordinates abused new rules in renewing drug production licenses to squeeze kickbacks from companies. His misdeeds led to approval of many medicines that should have been blocked or taken from the market, including six fake drugs.")

²⁰⁵ Id.

²⁰⁶ Id. (A death penalty with a two-year reprieve is usually commuted to life in prison if the offender is deemed to have reformed. However, in the case of Zhen Xiaoyu, the court has decided to execute him. The reasoning behind this decision was Beijing's resolve to eradicate corruption and ensure consumer safety. The court justified its decision by declaring that "Zheng's dereliction of duty has undermined the efficiency of China's drug monitoring and supervision, endangered public life and health and has had a very negative social impact.")

²⁰⁷ Id.

²⁰⁸ *China vows harsh punishment on food safety crimes*, CHINADAILY, http://www.chinadaily.com.cn/china/2010-09/16/content_11311316.htm (last updated Sep. 16, 2010).

bribes and protect or ignore food safety.²⁰⁹ In addition the document declared that “[g]enerally, officials who are involved in food safety crimes should not be given a reprieve or be exempt from criminal punishment.”²¹⁰

A similar language was used earlier this year by, Mr. Xi Jinping, general secretary of the Central Committee of the Communist Party of China (“CPC”), who swore to fight against corruption.²¹¹ He declared before the CPC that the “power should be restricted by the cage of regulations.”²¹² That is, the government should develop a “disciplinary, prevention and guarantee mechanism” to discourage individuals from committing corruption.²¹³ Especially encouraging, is Xi Jinping’s determination to “fight every corrupt phenomenon [and] punish every corrupt official, [] so as to earn people’s trust with actual results.”²¹⁴ In addition, the CPC general secretary demanded “no exception [] when it comes to Party disciplines and law” and promised to investigate cases completely and without leniency for anyone involved.²¹⁵

The aspirational words of Hu Jintao and the commitment of Xi Jinping to the fight against corruption, strongly resonate with the Chinese people.²¹⁶ According to the 2012 Pew Global Attitudes China Project polls, fifty percent of Chinese blame corrupt officials and thirty percent blame corrupt businesses for China’s problems.²¹⁷ These public concerns are merited in

²⁰⁹ Id. (This promise seems to directly reflect the official negligence and procrastination in the melamine milk scandal.)

²¹⁰ Id.

²¹¹ *Xi Jinping vows ‘power within cage of regulations’*, China.org., Jan. 13, 2013, http://www.china.org.cn/china/2013-01/23/content_27767102.htm

²¹² Id.

²¹³ Id.

²¹⁴ Id.

²¹⁵ Id. (One of the major issues with China’s inability to successfully combat corruption is the inconsistent enforcement of the laws, which induces individuals to take bribes and commit fraud. Thus, striving for uniform application of the laws is undeniably a step in the right direction.)

²¹⁶ *Chinese increasingly worried about graft, inequality: survey*, REUTERS, <http://www.reuters.com/article/2012/10/16/us-china-attitudes-idUSBRE89F0U620121016> (last updated Oct. 16, 2012).

²¹⁷ Id.

light of the 2012 Corruption Perceptions Index that places China in 80th place out of 176 countries for being one of the most corrupt nations to do business.²¹⁸

In an attempt to regain the public trust, China's Premier Wen Jiabao, publicly announced that there is a need for "moral training" in the food industry to eliminate corruption and ensure food safety.²¹⁹ Moral training was included in China's 12th Five-Year Plan and directed the FSC to require training for all incoming workers in the food production industry.²²⁰ The training is one of the authorities' efforts to restore the country's food industry.²²¹ However, unless China eliminates opportunities for rent-seeking behavior among officials and ensures consistent application and enforcement of its laws, the prevalence of corruption will remain high. China needs to firmly establish that the probability of being caught and the consequences, in terms of punishment and financial losses for those who commit illegal acts, are high.

C. Environmental Influences on Food Safety

With yearly GDP rates of at least 7.5 percent,²²² China's rapid and persistent economic growth has catapulted it in to the second place on the list of the world's largest economies, behind the US.²²³ However, China's economic success has led to profound domestic environmental consequences.²²⁴ For example, China's pollution affects millions of people directly, who suffer from various diseases due to immediate exposure to the toxins in the air and

²¹⁸ Kevin Voigt, *Best, worst nations for corruption*, CNN, Dec. 6, 2012, <http://edition.cnn.com/2012/12/06/business/best-worst-corrupt-countries>.

²¹⁹ *Moral education urged to ensure food safety*, CHINADAILY, http://www.chinadaily.com.cn/china/2011-06/16/content_12714940.htm (last updated June 16, 2011).

²²⁰ Id. (According to the Plan, employers and employees must receive a minimum of 40 hours of rigorous training on laws, regulations, scientific knowledge and professional ethics concerning food safety.)

²²¹ Moral training appears to be a political move to revamp China's food industry. However, there appears to be no scientific data on whether it will help eradicate corruption or ensure food safety. Instead of pointless moral indoctrination, China should focus on educating its citizens about food safety and consequences of food poisoning.

²²² Hou Qiang, *China keeps 2013 GDP growth target unchanged at 7.5%*, XINHUA, http://news.xinhuanet.com/english/china/2013-03/05/c_132207941.htm (last updated March 5, 2013).

²²³ David Barboza, *China Passes Japan as Second-Largest Economy*, N.Y. TIMES, Aug. 5, 2010, <http://www.nytimes.com/2010/08/16/business/global/16yuan.html?pagewanted=all>.

²²⁴ Joseph Kahn and Jim Yardley, *As China Roars, Pollution Reaches Deadly Extremes*, N.Y. TIMES, Aug. 26, 2007, <http://www.nytimes.com/2007/08/26/world/asia/26china.html?pagewanted=all>.

the drinking water.²²⁵ China's pollution also affects millions of people indirectly through the consumption of ecologically contaminated foods.²²⁶ Accordingly, environmental degradation poses a sizeable obstacle to the ability of the Chinese government to enforce its food safety laws.

There is a growing concern among environmentalists about food safety in China, due to the use and overuse of pesticides and fertilizers on China's farm lands.²²⁷ The main reason for the high use of pesticides and fertilizers among the Chinese farmers is the year-round planting of crops, which leaves China's soil without any natural nutrients.²²⁸ According to the Chinese Academy of Agricultural Sciences ("CAAS"), fifty percent of China's agricultural land currently exceeds the internationally accepted limits of nitrogen fertilizer.²²⁹ The benefit of using fertilizers is that it helps China to achieve high yields of grain harvests to insure food security for a country of billion people.²³⁰ However, the overuse of fertilizers and pesticides causes severe land degradation and decreases crop diversity.²³¹ To make matters worse, the unabsorbed fertilizers penetrate the soil and cause widespread groundwater nitrate pollution, making the water unsafe to drink.²³² Thus, "aquaculture production" is of particular concern to the people in China, the Chinese government, and the scientists.²³³

²²⁵ Id. ("According to China's Ministry of Health, "pollution has made cancer China's leading cause of death" and "[a]mbient air pollution alone is blamed for hundreds of thousands of deaths each year. Nearly 500 million people lack access to safe drinking water.")

²²⁶ David Barboza, *In China, Farming Fish in Toxic Waters*, N.Y. TIMES, Dec. 15, 2007, <http://www.nytimes.com/2007/12/15/world/asia/15fish.html?pagewanted=all>.

²²⁷ Jason Czarnecki, Yanmei Lin and Cameron Field, *Global Environmental Law: Food Safety & China*, August 21, 2012, Vermont Law School Research Paper No. 20-12, at 5, available at SSRN: <http://ssrn.com/abstract=2133551>.

²²⁸ Id.

²²⁹ Yang Meng, *The damaging truth about Chinese fertiliser and pesticide use*, CHINADIALOGUE, July 9, 2012, <http://www.chinadialogue.net/article/show/single/en/5153>.

²³⁰ Czarnecki, *supra* note 227.

²³¹ Id.

²³² Id. See also Meng, *supra* note 229 ("A CAAS survey of intensive vegetable farms in 20 counties in five northern provinces found that half of 800 points surveyed had excessive levels of nitrates in ground water attributable to fertilizer. CAAS predicted that all central and south-eastern provinces bar Jiangxi and Shanxi were at high risk of suffering groundwater nitrate pollution by 2015.")

²³³ Id.

In addition to nitrate pollution, improper industrial disposal of electronic and plastic waste chemicals as well as heavy metals such as cadmium, arsenic, mercury and petroleum organic compounds, adulterate both: farm land and the nation's rivers.²³⁴ According to the research findings conducted by the CAAS, "about 16 percent of China's 120 million hectares of farm land had suffered from pollution at different levels and 10 million hectares were polluted by industrial pollutants."²³⁵ Likewise, a large percentage of China's rivers is "so contaminated that it should not even be touched, yet tremendous amounts of grains, vegetables, and fruits that are served in homes and restaurants, as well as textiles that are sold in markets, are irrigated with untreated industrial wastewater."²³⁶ As one farmer from the Shandong Province has explained, "there is no water source except for this dirty water. We have to use it."²³⁷ He admitted of using water contaminated with chemicals to the extent that it appeared black during irrigation.²³⁸ And even though most of the crop perished after being irrigated with contaminated water he and other farmers sold whatever crop has survived.²³⁹

In recent years most of the attention undeniably went to the news reports on adulterated rice - the staple of the Chinese diet - by heavy metals in the polluted soil.²⁴⁰ One of the heavy metals found in rice was cadmium, which has been associated with bone and joint pains and in

²³⁴ Id.

²³⁵ *Pollutants, pesticides threaten farm land*, XINHUA, http://news.xinhuanet.com/english/china/2012-06/12/c_131648038.htm (last updated June 12, 2012).

²³⁶ Nadya Ivanova, *Toxic Water: Across Much of China, Huge Harvests Irrigated with Industrial and Agricultural Runoff*, CIRCLE OF BLUE, Jan. 18, 2013, <http://www.circleofblue.org/waternews/2013/world/toxic-water-across-much-of-china-huge-harvests-irrigated-with-industrial-and-agricultural-runoff/>.

²³⁷ Id.

²³⁸ Id.

²³⁹ Id.

²⁴⁰ Kathleen McLaughlin, *Tainted Rice Part of China's Pollution Problem*, PBS, Nov. 29, 2011, http://www.pbs.org/newshour/updates/globalhealth/july-dec11/china_11-29.html (Ten percent of China's domestically grown rice, and a total of twelve million tons of all grains are polluted by heavy metals, such as cadmium in the soil. Cadmium presumably deposited onto southern China's fertile farmlands through years of industrial waste and sewage disposal.)

some cases kidney failures.²⁴¹ In response to the public outrage, the Chinese government promised to take necessary steps, such as setting “nationally significant standards for water, soil, and food” to tackle the problem of toxic rice.²⁴² However, according to a professor in agriculture from the university in Nanjing, the severity and the pervasiveness of soil and groundwater contamination is so substantial that “the pollutants will stay in the soil for hundreds of years without a proper treatment.”²⁴³ In some instances the damage may even be “irreversible.”²⁴⁴ Not surprisingly, some experts, like Fan Mingyuan, of the Water Resources Research Institute of Shandong Province, conclude that the “crop security is the number one problem in the nation.”²⁴⁵

Similar to adulterated rice, the Chinese fishery business is greatly affected by industrial waste, sewage and agricultural runoffs.²⁴⁶ One of Fuqing eel and shrimp farmers in the Fujian Province described the local rivers as “filthy”.²⁴⁷ Faced with the toxic waters, fish farmers have taken drastic measures in 2007 and began adding veterinary drugs and pesticides into the fish feed to save their stocks and secure their revenue.²⁴⁸ Yet, drugs and pesticides leave “poisonous and carcinogenic residues in seafood, posing health threats to consumers.”²⁴⁹ When the European Union, Japan and the United States have partially or completely refused imports of Chinese fish in 2007, after finding traces of illegal drugs, the fish farmers stopped using the medicine.²⁵⁰ However, many farmers had to see their subsistence threatened as their incomes declined due to “a 30 percent decline in survival rates of their fish and other seafood.”²⁵¹

²⁴¹ Id.

²⁴² Id.

²⁴³ *Pollutants, pesticides threaten farm land, supra*, note 235.

²⁴⁴ Id.

²⁴⁵ Ivanova, *supra* note 236.

²⁴⁶ Barboza, *In China, Farming Fish in Toxic Waters, supra* note 226.

²⁴⁷ Id.

²⁴⁸ Id.

²⁴⁹ Id.

²⁵⁰ Id.

²⁵¹ Id.

The legislative response to environmental degradation has been considerable.²⁵² The NPC has enacted numerous environmental laws and regulations in the past several decades.²⁵³ However, as with the FSL, the effectiveness of the environmental laws and regulations is reduced by improper adherence and enforcement.²⁵⁴ As a result, China's environment continues to deteriorate.²⁵⁵

China's water and soil pollution "are so prevalent that the nation's farm productivity, its economy, and the people's health are at risk as modernization, urbanization, and food demand are steadily increasing."²⁵⁶ China's strong emphasis on economic growth, coupled with ineffective enforcement of environmental laws and regulations, has led to severe environmental degradation and has caused problems for the Chinese food industry, harming the country's economy.²⁵⁷ Chinese experts have stressed that their government needs to refocus its economic development agenda and adjust its policies in light of the country's growing environmental decay.²⁵⁸ The FSL imposes stricter national food safety standards, yet it completely ignores the reality of China's environmental deterioration. There are no provisions in the FSL focusing on how food safety laws can be implemented and enforced if, for instance, the farmers are forced to

²⁵² See Ministry of Environmental Protection website, *available at* <http://english.mep.gov.cn/>. See also Ministry of Water Resources, *available at* <http://www.mwr.gov.cn/english/>. (The list of environmental laws for example includes: Environmental Protection Law of the People's Republic of China of 1989, Soil and Water Conservation Law of 1991, Water Law of the People's Republic of China of 2002, Law of the People's Republic of China on the Promotion of Clean Production of 2003, Law of the People's Republic of China on Environmental Impact Assessments of 2003, Law of the People's Republic of China on Prevention and Control of Water Pollution of 2008 and Circular Economy Promotion Law of 2009.)

²⁵³ *Id.*

²⁵⁴ Wang Canfa, *Chinese Environmental Law Enforcement: Current Deficiencies and Suggested Reforms*, Vermont Journal of Environmental Law, vol. 8, 2006-2007, at 164-169, *available at* <http://www.vjel.org/journal/pdf/VJEL10058.pdf>. (There are several problems: environmental laws and regulations are superficially enforced, illegal activities are not adequately investigated, there is a delay in the punishment for illegal acts, pollution victims are not adequately compensated, relevant environmental protection administration lack authority, etc.)

²⁵⁵ *Id.*

²⁵⁶ Ivanova, *supra* note 236.

²⁵⁷ *Pollutants, pesticides threaten farm land*, *supra* note 235.

²⁵⁸ *Id.* (Countries around the world are increasingly refusing imports of Chinese products.)

irrigate their harvest with or raise their stocks of fish in contaminated water. Accordingly, China's environmental pollution poses a sizable challenge for the government in enforcing the laws on food safety.

IV. Conclusion

As the second largest economy in the world, China has the responsibility to its own people and to the world community to work out a comprehensive food safety plan. The FSL represents a significant legislative commitment toward ensuring uniform national food safety standards, and creating a new governmental body dedicated to food safety oversight and enforcement. The FSL also imposes harsher penalties for food producers, traders and government officials, who are directly responsible for food safety violations.

However, the FSL has significant limitations that fail to fully address the root causes of China's food safety. First, the law allows the local governments and various food industries to develop their own food safety standards, which aggravates the existing problem of inconsistent and duplicative standards on food safety. Second, the law also does not make an effort to consolidate the various executive agencies under the State Council, which are a direct source of regulatory loopholes. And third, the FSL does not adequately deter food producers, traders and government officials from engaging in illegal food practices.

Moreover, the success of the FSL appears to be thwarted by various enforcement obstacles. First, the problem of local protectionism appears to be so pervasive in China's governmental structure that it seems impossible to tackle the problem without major institutional changes. The central government has to address the problem of accountability to ensure that the officials are acting in the best interest of their communities and do not exploit their official and powerful positions for personal gains. Second, China must improve its problems with corruption

and unscrupulous practices. There is a great need for China to ensure that its laws are applied and enforced consistently to enhance the deterrence effect. Finally, the central government in Beijing must refocus its economic growth plan in light of the country's environmental degradation, and ensure an effective implementation and enforcement of its environmental laws. In the end, the safety of China's food can only be achieved if the ecological conditions are dramatically improved.

Ensuring food safety is not an easy task for a country of billion people that rose, in only three decades, to one of the most powerful nations in the world. However, to maintain and strengthen its economic muscle, China must address crucial domestic deficiencies including major problems in its food sector.